Supreme Court, U.S.
FILED
FEB 4 1998

No. 97-1103

In The

Supreme Court of the United States

October Term, 1997

CAROL A. ELEWSKI,

Petitioner,

vs.

CITY OF SYRACUSE and ROY BERNARDI, in his official capacity as Mayor of the City of Syracuse,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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10 pp

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STATEMENT OF THE CASE

Petitioner seeks this Court's review of the Second Circuit's affirmance of the Northern District of New York's refusal to enjoin the inclusion of a crèche in the City of Syracuse's 1995 downtown holiday display as an Establishment Clause violation. The courts below were not in error and therefore the petition should be denied.

Annually, the City of Syracuse displays a crèche in Clinton Square, a public park in downtown Syracuse. In December of 1995, the crèche was displayed downtown. Behind it stood a Christmas tree approximately fifty-five feet high decorated with colored lights and a star at the top. Displayed also in Clinton Square were trees and bushes decorated with colored lights and figurines. Artificial greenery, wreaths and colored lights decorated the surrounding sidewalk lampposts.

Two hundred feet from Clinton Square is another public park, Hanover Square. It was decorated with twelve wire bells containing greenery and lights, a Christmas tree with colored lights topped by a star, a Jewish menorah, snowman and reindeer. Within the decorated downtown area the City sponsored a myriad of holiday activities ranging from musical acts to a Kwanza celebration.[1]

The courts below found that a reasonable observer would view the crèche within the context of the other downtown decorations, displays and the holiday season. Rejected was petitioner's claim that mere inclusion of the creche was an establishment of the Christian religion.

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1. Mayor Roy Bernardi and Ronald Jennings, Commissioner of Parks, Recreation, and Youth Programs for the City, testified that the seasonal displays were to bring the community together during the holidays and to promote downtown business.

No dispute appears over the controlling cases. In direct contravention to the lower courts' decisions, however, petitioner urges this Court to (1) determine that some displays and decorations were too far away from the crèche but the Christmas tree was too close; (2) focus primarily on the religious aspect of the crèche to the exclusion of its secular function; and (3) focus on the crèche to the exclusion of the other downtown displays, events and decorations.

This Court should not indulge requests to pull out its tape measure each time a municipality sets up a holiday display. Concerning such a fact-bound contention, the judgment of the district court should not be disturbed.

Alternatively, petitioner seeks to have this Court vacate the Second Circuit's judgment for "mootness" because she moved to Alabama pending the decision. Petitioner points to a letter she sent to the Second Circuit's case manager stating where she could be reached for "matters of correspondence." *Pet. App.* D. Petitioner however, failed to inform the court that she had made a permanent move. The letter fails to establish mootness. On the contrary, the evidence shows that claimant veiled her mootness claim pending the outcome of her appeal. The mootness doctrine cannot be applied in a way to sanction an abuse of the judiciary.

REASONS FOR DENYING THE WRIT

Petitioner's claim that the courts below abused their discretion in determining that the inclusion of the crèche in Syracuse's holiday display passed constitutional muster does not warrant review by this Court.

I.

REVIEW IS NOT WARRANTED BECAUSE THE CONTENTION IS PURELY FACT-BOUND.

No real dispute over the applicable law presents. The petitioners, the respondents, the Second Circuit majority, and the Second Circuit dissent all agree that the controlling cases are *Lynch v. Donnelly,* 465 U.S. 668 (1984); *County of Allegheny,* 492 U.S. 573 (1989) and *Capitol Square and Advisory Bd. v. Pinette,* 115 S. Ct. 2440 (1995). The nucleus of the dispute is the application of these cases to the facts.

Petitioner claims that the myriad seasonal displays and decorations are too far away from each other, and that the Christmas tree and the crèche are too close to each other. Plainly, the issue here is whether the proximity of the display decorations to the crèche form an "endorsement" of religion. As the dissent recognized, this is an "intensive fact-specific analys[is]." *Pet. App.* at 17a. *Accord Pet. App.* at 9a (majority views crucial issue as factual context of crèche). In concluding that a "reasonable observer" would not view the seasonal display as an establishment of religion, the courts below performed a careful analysis of the facts. Such a fact-bound contention of this nature does not warrant Supreme Court Review. *See* Supreme Court Rule 10.

II.

THE SECOND CIRCUIT PROPERLY FOLLOWED SUPREME COURT PRECEDENT BY REFUSING TO ISOLATE THE CRÈCHE FROM ITS FESTIVE ENVIRONS.

Just months before the petitioner challenged the crèche display, this Court decided *Capital Square* in which Justice O'Connor stated that "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Id.* at 2452. Petitioner urges that such an observer is one who would disregard the festive environs surrounding the crèche. Such myopic scrutiny has been flatly rejected by this Court. On the contrary, "the knowledge attributed to the reasonable observer [cannot] be limited to the information gleaned simply from viewing the challenged display." *Id.* at 2455.

Applying this same principal in the context of a seasonal display, this Court stated that "the focus of our inquiry must be on the crèche in the context of the Christmas season." *Lynch v. Donnelly,* 465 U.S. 678, 670 (1984).[2] That principle was readily apparent to the Second Circuit when it observed: "A reasonable observer is not one who wears blinders and is frozen in a position focusing solely on the crèche." *Pet. App.* at 9a. In fact, the

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2. Here, the facts largely paralleled those in *Lynch*. There, a public park in downtown Pawtucket, Rhode Island, contained

> figures and decorations traditionally associated with Christmas, including among other things, a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree . . . hundreds of colored lights . . . and the creche. . . .

Id. at 671. This Court found the display constitutional.

reasonable observer would be informed of the "history", "context", and "forum" concerning the crèche. *Capital Square,* at 2455.

To see the seasonal display here, the Second Circuit plainly observed:

> one has to use streets with lampposts decorated with artificial greenery, wreaths, and colored lights. . . . decorated trees, reindeer, a snowman, and wire bells. . . . the crèche would be visible on the right and the menorah would become visible on the left.

Pet. App. 10a.[3]

In its context a reasonable observer could not conclude that the crèche was an impermissible establishment of the Christian religion.

In *Allegheny*, this Court found that a menorah next to a tall Christmas tree, directly in front of the government City/County Building, was not an endorsement of the Jewish religion. Likewise, here, a crèche next to a tall Christmas tree in a public park cannot be an endorsement of the Christian religion.[4] Unlike the menorah

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3. Despite the many characteristics that the Second Circuit observed in the downtown display, petitioner argues that its review was not "particularized" enough. *Pet.* at 11. The apparent drive of this argument is to complain that there were too few secular symbols which were too far away from the crèche. Petitioner would have this court reviewing the minutia of every governmental holiday display to determine that the "particular" numbers, sizes and distances relative to each crèche result in sufficient secularization.

4. Referring to *Allegheny*, petitioner states

> In explaining why a menorah could [be] displayed together

(Cont'd)

in *Allegheny*, however, the crèche here cannot be observed on the steps of a government building. That a reasonable person would also simultaneously view the crèche, Christmas tree, lighted reindeer, menorah, snowman and correlative ornamentation, further erases the contention that the City of Syracuse is endorsing religion.

As in *Lynch*, the crèche here does no more than ". . . depict[ ] the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680.

III.

THE CLAIM OF MOOTNESS SHOULD BE REJECTED BECAUSE PETITIONER DID NOT CLAIM MOOTNESS UNTIL AFTER RECEIVING AN UNFAVORABLE DECISION BELOW.

Petitioner points to a letter written to the case manager of the Second Circuit of evidence that her claim was moot because she had moved. *Pet.* at 10. It appears that petitioner would have this Court read the letter as her formal motion to withdraw the case.

The letter — which states "for matters of correspondence, I can now be reached at the address at the top of this page" *Pet. App.* D. — does not remotely establish mootness. The letter

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(Cont'd)

> with a Christmas tree, this Court emphasized the immediate physical context of the menorah

Pet. App. 11 (citation omitted). Petitioner's point proves too much: that the creche in this case can be displayed because — precisely like the menorah in *Allegheny* — it is displayed together with the Christmas tree.

must be considered for what it does not say: that petitioner indeed moved, is planning to move, that the move is permanent, and that her controversy is not capable of repetition yet evading review, *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972), (*e.g.*, if petitioner regularly returns to Syracuse during the holidays).

If petitioner did in fact have a factual predicate for mootness, she should have argued mootness before the Second Circuit prior to its decision. To keep a mootness claim in reserve, while waiting to see whether the court's decision will be favorable, is to abuse the judicial system. This Court should not honor such conduct.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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